

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DARRELL LEWIS,)	
)	C.A. No. 05A-10-001 (JTV)
Appellant,)	
)	
v.)	
)	
STATE OF DELAWARE,)	
DEPARTMENT OF AGRICULTURE,)	
DELAWARE HARNESS RACING)	
COMMISSION,)	
)	
Appellee.)	

Submitted: October 19, 2006

Decided: January 31, 2007

John R. Garey, Esq., Dover, Delaware. Attorney for Appellant.

Philip Bangle, Esq., Department of Justice, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's Appeal
From Decision of the Delaware Harness Racing Commission
AFFIRMED

VAUGHN, President Judge

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OPINION

Darrell Lewis (“Mr. Lewis”), trainer of the racehorse, *Race for Gold*, has appealed the Delaware Harness Racing Commission’s (“the Commission” or “DHRC”) decision dated July 28, 2005.¹ The Commission concluded that on March 1, 2005, Mr. Lewis violated Commission Rule 8.9.14² when *Race for Gold* tested positive for blood gas levels in excess of the permissible levels established by Commission Rule 8.9.15.2.1.³ The Commission imposed a penalty of a nine month suspension and a \$3,000 fine for the violation.⁴

FACTS

Race for Gold was among a number of horses scheduled to run in the first race at Dover Downs on Tuesday, March 1, 2005. Pursuant to the Commission Rules, section 8.9, *Race for Gold* was pre-selected for a pre-race blood screening. Pre-race tests are administered to determine whether an alkalyzing agent has been given to the tested horse to enhance racing performance. The test, whether for base excess or total CO₂, measures levels of blood gases in the racehorse.

Race for Gold’s first pre-race test, on March 1, 2005, indicated a CO₂ level of

¹ Reflected throughout this Opinion is the 2005 version of the Delaware Harness Racing Commission Rules.

² No foreign substance shall be carried in the body of a horse when the horse is on the grounds of the licensed racetrack; it shall be a violation of this rule for a horse to test positive in a pre-race test result using a blood gas analyzer or other testing equipment.

³ A horse must show a base excess level of 10.4 mmol/l (mEq/l) or higher for non-furosemide (Lasix) treated horse, in order for a violation to be reported under this Rule.

⁴ Del. Harness. Comm’n Rule 8.3.2.3.

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38.0 mmol/L and a base excess level of 10.3. The test was re-run with results indicating a CO₂ level of 38.1 and base excess level of 10.6. Both tests were run back-to-back using the same tube of blood. A second test was then performed from a second tube of blood. That test produced readings of 38.6 for CO₂ and 11.2 for base excess. A sample of the blood drawn from *Race for Gold* the same day was sent to Dalare Associates for confirmatory testing. That test resulted in a CO₂ level reading of 38.6.

Subsequent to the positive test results of March 1, 2005, Mr. Lewis exercised his rights under Commission Rule 8.10.1 to have *Race for Gold* quarantined for further observation and testing. The purpose of quarantine is to test the blood gas levels in a horse under conditions in which no foreign substances could possibly be administered to the horse and over a period of time long enough for any foreign substances to be flushed from the horse's system. Quarantine can be used to show that a particular horse's blood gas levels tested high because the horse has naturally high blood gas levels. During the quarantine, which typically lasts 72 hours, DHRC periodically tests the horse's blood gas levels.

When presented for quarantine, *Race for Gold* was tested to get an initial blood gas level reading. The results of that initial test indicated a base excess level of 11.2 and a total CO₂ level of 40.02. On March 13, 2005, the first day of quarantine, another test *Race for Gold's* showed a CO₂ level of 32.7 and base excess level was 4.8. During the next two days, *Race for Gold* was loaded on and off of the trailer to simulate race day procedures. The regular quarantine procedures of testing the horse at rest were changed to accommodate the request of Mr. Lewis. On March 14, 2005,

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Race for Gold's CO₂ level was 38.0 and base excess level was 9.7; and on March 15, 2005, the last day of the quarantine, the horse's CO₂ level was 36.5 and base excess level was 7.8.

On March 24, 2005, an additional attempt was made to duplicate the events leading to *Race for Gold's* positive test results on March 1, 2005. Following that attempt, the horse tested at a base excess level of 7.0.⁵

It is Mr. Lewis' contention that *Race for Gold* is a "naturally high" horse. A "naturally high" horse has blood gas levels in excess of those of a normal horse.⁶ Dr. Larry Soma, from the University of Pennsylvania School of Veterinary Medicine, testified on behalf of Mr. Lewis. Dr. Soma testified that the average base excess level for a horse is approximately 4 with higher horses tending to have levels around 7. Dr. Soma further testified that a high end of 10 is rare, but could occur due to a horse's response to change in his environment. He also testified that the level of CO₂ in horses tends to run around 31 to 36.

Dr. Soma based his opinion that *Race for Gold* is a "naturally high" horse on his research; his own base excess and quarantine studies of other horses; his review of the quarantine results and information provided to him by Mr. Lewis; and Mr. Lewis' claim that *Race for Gold* is "a nervous horse." He did not perform any actual tests on *Race for Gold*. In Dr. Soma's opinion, the base excess level of 11.2 at the time *Race*

⁵ Race day procedures were not precisely simulated because the horse was not tacked.

⁶ Pursuant to Del. Harness Comm'n Rule 8.10.3.16 or 8.3.3.3.3, when a horse has a prohibited level of a substance that occurs naturally, the trainer has the right to attempt to prove the horse has a "naturally high" level due to his particular physiological makeup.

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for Gold was presented for quarantine was high, In fact, way beyond the range of normal for 99.9% of the horse population. Dr. Soma further testified that the base excess level of 4.8 on March 13, 2005 was about normal and that the rise from 4.8 to 9.7⁷ on March 14, 2005 represented a significant rise above the normal distribution in a large population of horses.

The Commission found that based upon Dr. Soma's testimony, his opinion was that it was a possibility that *Race for Gold's* base excess and CO₂ levels change when he is transported. Dr. Soma testified that certain horses have an increase in CO₂ and base excess levels due to nervousness, which can occur during transportation. During cross-examination, Dr. Soma agreed that if a trainer gave a high enough dose of something to the horse before transport, and gave it time to clear, that there could be some cycling during quarantine.

Commission Rule 8.9.15.2.1 establishes 10.4 (10 with a 0.4 margin of uncertainty) as the threshold base excess level required to find a violation for a non-furosemide horse. The Commission concluded that in order to demonstrate that a horse is a "naturally high" horse, and thus exempt from the requirements of Commission Rule 8.9.15.2.1, the horse would have to test in excess of permissible limits established by Commission Rule 8.9.15.2.1 during quarantine.

The Commission concluded that although there were fluctuations in the levels during the period of quarantine from March 13, 2005 to March 15, 2005, at no time

⁷ The base excess level reading of 9.7 occurred after *Race for Gold* was placed in the horse trailer.

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during the quarantine did *Race for Gold's* base excess level test in excess of 10.4. In addition, the Commission found that *Race for Gold* never achieved a base excess level in excess of the prohibited level during the supplemental quarantine that occurred on March 23, 2005 through March 24, 2005.

Based on all of the evidence presented, DHRC concluded that *Race for Gold's* March 1, 2005 pre-race base excess levels of 10.6 and 11.2 were not the result of *Race for Gold* being a "naturally high" horse. Therefore, the Commission found Mr. Lewis in violation of Rule 8.9.14 on March 1, 2005, the race day that *Race for Gold* tested positive for blood gas levels in excess of the permissible levels established by Rule 8.9.15.2.1. The Commission imposed a penalty of a nine month suspension and a \$3,000 dollar fine.

STANDARD OF REVIEW

_____The function of this Court in reviewing an appeal from the Delaware State Harness Racing Commission is to determine whether the Commission's decision is supported by substantial evidence and is free from legal error.⁸ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁹ The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.¹⁰ It merely determines if the

⁸ *Richards v. Harness Racing Comm'n*, 1998 Del. Super. LEXIS 511 at *4 citing *Delaware Harness Racing Commission v. Mitchell*, 442 A.2d 77, 79 (Del. Super. 1982).

⁹ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

¹⁰ *Richards*, 1988 Del. Super. LEXIS 511 at *4.

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evidence is legally adequate to support the agency's factual findings.¹¹ When reviewing an administrative agency's interpretation of regulatory provisions, this Court will defer to the construction placed by the administrative agency on regulations promulgated and enforced by it, unless shown to be clearly erroneous.¹²

DISCUSSION

Mr. Lewis claims that the Commission's decision was arbitrary and not supported by the evidence; that the Commission committed legal error by failing to consider substantial evidence; and that the Commission committed legal error by failing to decide the matter under the correct burden of proof.

Mr. Lewis incorrectly contends that the Commission decided the case using a prima facie evidence standard as opposed to a preponderance of evidence standard. The State's proof of its prima facie case, the high level of base excess detected in *Race for Gold* on March 1, 2005, resulted in a presumption that the trainer administered the prohibited substance to the horse.¹³ That presumption can be rebutted by "substantial evidence to the contrary."¹⁴ Among other things, Mr. Lewis offered the testimony of Dr. Soma that *Race for Gold* was a "naturally high" horse. The Commission weighed the evidence presented by the parties, determined questions of credibility, and made

¹¹ *Id.*

¹² *Dennis v. Delaware Harness Racing Comm'n*, 2006 Del. Super. LEXIS 374 at *5.

¹³ Del. Harness Comm'n R. 8.5.1, 8.9.16.

¹⁴ Del. Harness Comm'n R. 8.5.1.

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its own factual findings while arriving at its decision. It did not decide the case using a prima facie evidence standard but merely determined that Mr. Lewis failed to rebut the presumption that Mr. Lewis administered a prohibited substance by presentation of “substantial evidence to the contrary.”

Next, Mr. Lewis claims that the Commission erred by failing to consider substantial evidence. Specifically, Mr. Lewis claims that *Race for Gold*’s 38.0 CO₂ level on March 14, 2005, is evidence that the horse is “naturally high.” Mr. Lewis argues that the Commission mistakenly weighed the evidence by focusing on the base excess levels of *Race for Gold* during quarantine and not the CO₂ reading of 38, which occurred on the second day of quarantine.¹⁵ The problem with this argument is twofold.

First, Mr. Lewis failed to raise the issue at any time in front of the Commission. Nowhere did Mr. Lewis argue to the Commission that it should consider *Race for Gold*’s 38.0 CO₂ level while in quarantine as evidence that the horse was “naturally high” for purposes of the base excess rule, 8.9.15.2.1. If Mr. Lewis felt that *Race for Gold*’s CO₂ level of 38.0, on the second day of quarantine, was important in deciding whether *Race for Gold* was a “naturally high” horse for the purposes of 8.9.15.2.1, then Mr. Lewis should have raised the issue to the Commission prior to this appeal.

¹⁵ Del. Harness Comm’n R. 8.9.15.1 sets the outer CO₂ limits permissible for non-furosemide racehorse at 37.0 mmol/L.

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Issues not raised at trial should not be considered on appeal.¹⁶ “When the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record and will not consider issues not raised before the agency.”¹⁷ This waiver rule “furthers the goal of permitting agencies to apply their specialized expertise, correct their own errors, and discourage litigants from reserving issues for appeal.”¹⁸ The argument is therefore considered waived.

Second, the Commission found Mr. Lewis in violation of 8.9.15.2.1, the base excess rule and not 8.9.15.1, the CO₂ rule. In the alternative to 8.9.15.1, Rule 8.9.15.2.1 allows the Commission to use a testing machine that measures total carbon dioxide levels using base excess testing protocol. Mr. Lewis argues that the Commission mistakenly weighed the evidence by focusing on the base excess levels during quarantine and disregarding a CO₂ level of 38.0 that occurred on the second day of quarantine. However, the Commission concentrated on *Race for Gold*’s basis excess levels because that is the Rule that they determined Mr. Lewis violated.¹⁹

When reviewing an administrative agency's interpretation of regulatory provisions, this Court will defer to the construction placed by the administrative

¹⁶ *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980); *Equitable Trust Co. v. Gallagher*, 77 A.2d 548 (Del. 1950); *Feldman v. Foulk*, 178 A.2d 479, 481 (Del. 1962).

¹⁷ *Welding & Boiler Repair Co. v. Zakrewski*, 2002 Del Super LEXIS 32 at *10-11.

¹⁸ *Down Under, Ltd. v. Delaware Alcoholic Bev. Control Comm’n*, 576 A.2d 675, 677 (Del. Super. 1989).

¹⁹ Commission Rule 8.9.15.2.1 sets the outer limits of base excess permissible in a given racehorse, not 8.9.15.1, which sets the outer limits of CO₂ permissible in a given racehorse.

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agency on regulations promulgated and enforced by it, unless shown to be clearly erroneous.²⁰ The Delaware Harness Racing Commission decided that “[i]n order to demonstrate that a horse is a naturally high horse, [for the purposes of 8.9.15.2.1,] that the horse would have to test in excess of the permissible limits established by Commission Rule 8.9.15.2.1 during the period of quarantine.” This Court will defer to the Commission’s construction of when a horse is “naturally high” and thus not in violation of Commission Rule 8.9.15.2.1. It is not clearly erroneous that the Commission would decide that in order to be a “naturally high” horse for the purposes of 8.9.15.2.1, that the horse would have to have a reading in quarantine of a base excess level at least as high as those prohibited by the rule itself.

Finally, Mr. Lewis claims that the Commission’s decision was arbitrary and not supported by substantial evidence. Evidence was presented by the State that *Race for Gold*’s tests results indicated base excess levels of 10.6 and 11.2 on March 1, 2005, levels which are in violation of Rule 8.9.15.2.1. At the request of Mr. Lewis, *Race for Gold* was permitted to enter into quarantine in an attempt to prove that he was a “naturally high” horse. The results of the testing during quarantine indicated a base excess level of 11.2 and a total CO₂ level of 40.02 on the day the horse was presented. In Dr. Soma’s opinion, the base excess on the day *Race for Gold* was presented for quarantine of 11.2 was high. In fact, it was way beyond the range of normal for 99.9% of the horse population. During cross-examination, Dr. Soma agreed that if a trainer gave a high enough dose of something to the horse before transport, and gave it time

²⁰ *Dennis*, 2006 Del. Super. LEXIS 374 at *5.

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to clear, there could be some cycling during quarantine.

On March 13, 2005, the first day of quarantine, *Race for Gold's* CO₂ level was 32.7 and the base excess level was 4.8. During the next 2 days, *Race for Gold* was loaded on and off of the trailer to simulate race day procedures. The regular quarantine procedures of testing the horse at rest were changed to accommodate the request of Mr. Lewis. On March 14, 2005, the CO₂ level was 38.0 and the base excess level was 9.7; and on March 15, 2005, the last day of the quarantine, *Race for Gold's* CO₂ level was 36.5 and base excess level was 7.8.

Finally, on March 24, 2005, an attempt was made to duplicate the events leading to *Race for Gold's* positive test on March 1, 2005. After being unloaded from the truck that day, the horse only tested at a base excess level of 7.0.

Mr. Lewis was found in violation of 8.9.14 on March 1, 2005 when *Race for Gold* tested positive for blood gas levels in excess of the permissible limits established by 8.9.15.2.1. The evidence establishes that *Race for Gold* tested above the Commission limit for base excess levels in a pre-race screen on March 1, 2005 and did not again test in excess of the permissible base excess limits under 8.9.15.2.1 during quarantine. The Commission thus based its finding of a violation of Rule 8.9.15.2.1, the base excess rule, on substantial evidence.

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Therefore, the decision of the Delaware Harness Racing Commission is
affirmed.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary

cc: Order Distribution

File